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No. 85-1166

Supreme Court, U.S.
FILED
FEB 21 1986
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In The

Supreme Court of the United States

January Term, 1986

W. W. TAYLOR and
SOUTHWEST MORTGAGE SERVICE CORP.
Petitioner,

vs.

MICHAEL F. PEZZULLI,
Respondent.

FEDERAL HOME LOAN BANK BOARD,
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
WILLIAM CHURCHILL, LEONARD F. MCMANAMAN,
WILLIAM CAPSHAW, GARY ADAMS,
DOROTHY NICHOLS, ROSEMARY STEWART,
L. L. BOWMAN, E. FRANK HALL,
T. L. WELKER, SNIDER CAMPBELL,
CHRISTINA CHAVEZ, HAROLD DOUGLAS,
RAYMOND D. CHAVEZ, ANDREW SWARTHOUT,
DAVID W. BONEM, ROBERT WALLACE,
JOHN MCKINZIE, PAUL BARDACKE,
ELLEN SOUBERMAN, FRED SMITH,
SUN COUNTRY SAVINGS BANK,
LAS CRUCES, NEW MEXICO,
HI-PLAINS SAVINGS AND LOAN ASSOCIATION,
HEREFORD, TEXAS AND
JOHN DOES AND JANE DOES
numbered one through fifty
Other Defendants.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

LISTING OF PARENT AND SUBSIDIARY CORPORATIONS

Respondent Michael F. Pezzulli is a natural person and has no parent or subsidiary corporations.

STATUTES AND RULES INVOLVED

FED. R. CIV. P. 56(f) provides as follows in pertinent part:

> **(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavits the facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

On April 16, 1984, Petitioners filed this suit against 75 named and unnamed defendants, seeking damages in excess of $1 billion for an alleged conspiracy to deprive the Petitioners of their civil rights in connection with the ownership take-over of Hi-Plains Savings and Loan by Defendant T. L. Welker. Respondent Pezzulli was an attorney who represented Hi-Plains after it was taken over by Welker. Four months after the filing of the Complaint, Respondent Pezzulli filed his Motion for Summary Judgment as to paragraphs 46 and 47 of the Complaint, and shortly thereafter filed an additional Motion for Summary Judgment as to the balance of the Complaint against him. Pursuant to Federal Rule of Civil Procedure 54(b), a Final Judgment was signed on January 18, 1985, providing that Petitioners take nothing against Respondent Pezzulli.

During the course of the suit, Petitioners sought to take certain discovery against various defendants which the defendants alleged was improper. After considering Motions for Protective Orders and Motions to Quash filed by the defendants involved, the Magistrate prohibited Petitioners from taking the requested discovery *from the defendants*. At no time did the District Court order a stay of "all of the petitioners' discovery" as alleged in the Petition. Some of these discovery orders were appealed to the District Court by Petitioners, but after due consideration the District Judge sustained the Magistrate and prohibited the requested discovery for good cause. The merits of the various discovery orders are no longer being contested and are not part of the Petition.

For approximately a one month period during the nine months from the filing of the Complaint to the entry of summary judgment in favor of Respondent Pezzulli, the Magistrate mistakenly stayed all discovery through a misinterpretation of one of the District Court's discovery orders, but during the balance of the eight months, Petitioners could take unlimited discovery from third parties. Petitioners did not, however, take the deposition of any non-party witness either as general discovery or for use in connection with their Response to the Motions for Summary Judgment. Instead, Petitioners sought to quash notices of depositions of two non-party witnesses whose testimony bore on certain of their claims in paragraphs 46 and 47 of the Complaint.

SUMMARY OF ARGUMENT

Petitioners' allege they were prevented from developing facts sufficient to controvert Pezzulli's Motion for Summary Judgment by the trial court's actions in staying certain discovery sought by Petitioners and by ruling on the summary judgment motion in spite of Petitioners' request for more time to take discovery. Under Rule 56(f) of the Federal Rules of

Civil Procedure, the trial court has discretion to overrule or delay consideration of a summary judgment motion when such allegations are made. The standard of review of the trial court's actions is whether the court abused its discretion. Under the circumstances of this case, the trial court's actions were not an abuse of discretion and do not depart so far from the "usual and accepted course of judicial proceedings" to warrant review on a writ of certiorari.

Rule 56(f) expressly required Petitioners in this situation to describe their specific needs for additional discovery in an affidavit. They did not. Nor were any of Petitioners' unsworn motions or arguments detailed as to the nature of the discovery needed or why controverting facts could only be developed by taking the specific discovery which had previously been stayed by the trial court. By law, Petitioners' unsworn, vague allegations of the need for more discovery are insufficient to require a trial court to overrule or stay consideration of a summary judgment motion.

The authorities cited by Petitioners do not hold, as Petitioners claim, that mere unsworn allegations of the need for further discovery from a non-movant prohibit a court, on constitutional grounds, from granting summary judgment. At most, such authority recognizes a court's discretionary powers in extraordinary cases to dispense with the formalities of a Rule 56(f) affidavit when the facts of the case justify its actions. This does not mean, however, that its refusal to do so constitutes an abuse of discretion or violates due process.

Petitioners cite various opinions of different circuit courts relating to this area of discovery law, but fail to explain how or in what way such opinions are allegedly in conflict, and a review of such opinions discloses no conflict between the circuits.

Petitioners purport to raise a due process claim in their Petition, but this claim was never raised in the courts below

and is improperly raised for the first time in the Petition. In addition, Petitioners wholly fail to argue the merits of their due process claim in the body of the Petition and fail to cite any authority explaining or supporting their claim, leaving this argument so undeveloped as to amount to no argument at all.

Petitioners also purport to put the merits of the summary judgment in issue, but fail to argue this point in the body of their Petition, fail to identify the fact issues they allege exist, and fail to attach crucial portions of the summary judgment record such as their own Complaint or the second Pezzulli Affidavit in support of the motion, which prevents even a cursory review of the summary judgment. Both the District Court and Fifth Circuit reviewed the entire record and rejected Petitioners' arguments.

Petitioners finally attempt to bolster the existing summary judgment record by attaching various documents to their Petition as Appendix XI. This attempt to alter the existing summary judgment record after the fact is improper. In any event, the documents reveal on their face that they did not even exist until nine months after summary judgment was granted. The documents themselves are merely pleadings and routine correspondence relating to the case below or to pending state court litigation between the parties and do nothing to prove an alleged prior conspiracy to violate Petitioners' civil rights.

ARGUMENT AND AUTHORITIES

The gist of the Petition is that the District Court erred when it overruled Petitioners' request that it delay or deny consideration of Pezzulli's Motion for Summary Judgment because Petitioners desired to take additional discovery. The standard of review for such claims is whether the District Court abused its discretion. *Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir. 1980); *Wallace v. Brownell Pontiac-GMC Co.*, 703 F.2d

525 (11th Cir. 1983). Under this standard the Petition fails to raise substantive issues requiring review on a writ of certiorari.

Petitioners allege they were unable to respond to Pezzulli's Motion for Summary Judgment because the court's prior discovery orders had prevented them from taking the discovery needed to develop controverting facts. The Federal Rules state specifically the obligations of Petitioners in such a case:

> **When Affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for a judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FED. R. CIV. P. 56(f). It is undisputed that Petitioners failed to file an affidavit of their inability to present facts opposing the motion for summary judgment. Under the rules, this alone is enough to uphold the trial court's actions and deny review on a writ of certiorari.

Petitioners argue that the circumstances of this case, including the trial court's previous stay of certain discovery sought by Petitioners and the filing by Petitioners of an unsworn motion to continue consideration of pending *motions to dismiss* based on their desire to take more discovery, *required* the District Court to exercise its discretion and overrule or delay consideration of the motion in spite of Petitioners' failure to file a Rule 56(f) affidavit. This argument begs the question of whether such stay of discovery in fact prevented Petitioners from raising facts sufficient to oppose the motion, and requires the Court to assume that any stay of discovery would have this effect. This Court has expressly rejected this type of argument. *First National Bank v. Cities Service Company*, 391 U.S. 253, 290 (1968) (rejecting allegations that Plaintiffs may get

to a jury merely "on the basis of the allegations of their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations ... .").

Petitioners have an affirmative duty under the rules to explain in detail to the trial court, in an affidavit, exactly what facts are involved, how and why they may be learned only by taking the requested discovery, and the steps Petitioners have taken to raise fact issues from other sources — in general, why the court should exercise its *discretion* to overrule or continue the motion. FED. R. CIV. P. 56(f) *See generally* 10 A. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2741, p. 548 (1983) (requirements of Rule 56(f) provide a court with "a method of checking on the bona fides of the party opposing summary judgment and also might give it some indication whether a genuine fact issue is likely ever to be developed").

In this case Petitioners gave the trial court absolutely no details as to how its discovery orders hampered their ability to respond to the summary judgment motion. In their Response to the motion, Petitioners made only the following conclusory allegation:

> Since discovery has not been completed and many material facts which would establish the existence of the conspiracy to deprive Plaintiffs of their constitutional rights are within the exclusive control of the Defendants, the motion for the summary judgment is premature and improper.

Plaintiffs' Combined Response to Michael F. Pezzulli's Motion for Summary Judgment as to Entire Case Except for Paragraphs 46 and 47 and Motion for Sanctions in the Form of Attorneys' Fees, *reprinted in* Petition, Appendix VI, p. 4. Petitioners also filed an unsworn motion to stay consideration of pending motions to dismiss, which is reprinted in the

Petition as Appendix VII-1, where they again failed to state any specifics regarding the need for a stay. Such bare assertions that some unspecified discovery may turn up unspecified material facts do nothing to guide the trial court's decision and are unpersuasive in themselves. It was therefore not an abuse of discretion for the trial court, which had made the original discovery rulings for good cause, to overrule the request that summary judgment not be granted until that same discovery was taken.

Even if Petitioners' pleadings had been specific, the trial court would still be within its discretion in overruling the motion to stay because Petitioners failed to explain in detail why they were unable to gather facts from other sources not covered by the discovery orders, including their own testimony. Until Petitioners showed that there was some harm or prejudice from not taking the stayed discovery, it was not an abuse of discretion to deny the motion to stay and consider the merits of the summary judgment. *See* 10 A. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2741, pp. 548 *et. seq.* (1983) (discussing requirement that a party state what steps he has taken to obtain access to the relevant evidence). Nowhere in any documents filed in the trial court did Petitioners allege or prove that the stayed discovery was the only way to develop controverting facts.

Petitioners' argument amounts to a request for the exercise of two-fold discretion by the trial judge. First, Petitioners allege the trial court should have exercised its discretion to consider their unsworn motions regarding the need for more discovery in spite of the requirement of Rule 56(f) that such claim be made by affidavit and, second, that after considering their unsworn allegations, the trial court should have exercised its discretion and granted their request to overrule or delay consideration of the summary judgment motion. Only if the

trial court abused its discretion in both decisions may the judgment be overruled.

In support of their arguments that the trial court's actions were improper, Petitioners misrepresent the Fifth Circuit opinion in *John v. Louisiana (Board of Trustees)*, 757 F.2d 698 (5th Cir. 1985). On page 12 of their Petition, Petitioners imply that *John* establishes a rule that summary judgment will be reversed if the non-movant has indicated to the trial court in an unsworn "letter" that he desires to take more discovery and present additional evidence before the ruling on summary judgment. According to Petitioners, "the Fifth Circuit made no requirement for an affidavit from the non-moving party." Petition, p. 12. In fact, the *John* opinion states no such rule. The letter to the court was referred to in the opinion solely to decide the applicable standard of review. Specifically, the parties in *John* had agreed early in the case that it would be resolved on cross motions for summary judgment, based on the testimony previously given at the preliminary injunction hearing as supplemented by the scheduled deposition of a Mr. Molina. The anticipated schedule subsequently broke down and Plaintiff's counsel wrote a letter to the court stating that he felt summary judgment was no longer proper, that a trial would be necessary, and that he wished to bring forth additional evidence at the trial. The defendant, however, pursued its planned Motion for Summary Judgment which was granted by the trial court. On appeal, the Fifth Circuit initially faced the question of the standard of review. If the parties had agreed to a trial on a "stipulated record," the standard of review would not be as great and the judgment could be upheld even if disputed fact issues were found. On the other hand, if the judgment was a true summary judgment, the existence of fact issues would require a reversal. The Fifth Circuit recited the circumstances of the agreement and letter to the court and held that even if the original agreement would support an inference that judgment was based on a trial on stipulated

facts, the letter to the court was sufficient to repudiate the agreement, causing the judgment to be a true summary judgment and subject to the stricter standard of review. The letter to the trial court was discussed only in deciding the standard of review. On the merits, the opinion discloses no argument by appellants that summary judgment was improper due to a lack of discovery, and nowhere in the opinion does the court discuss the standards of Rule 56(f) or whether an unsworn "letter" to the court is sufficient to preserve error. The Fifth Circuit reversed the summary judgment, but the stated reasons for doing so involved the existence of disputed fact issues in the *existing* record and its rejection of the trial court's granting of a "default" summary judgment when the Plaintiff failed to file a response. Nothing in the *John* opinion indicates that the reversal had anything whatsoever to do with the need for further discovery.

Similarly, the other Fifth Circuit opinion cited by Petitioners, *Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir. 1980), does not hold that Rule 56(f) may be dispensed with, because apparently the non-movant in that case did file an affidavit. ("We assume *arguendo* that Walters' motion met the formal requirements of Rule 56(f), and that *his Rule 56(f) affidavit* alleged with sufficient particularly the controverting facts he expected to adduce . . ."). 626 F.2d at 1321 (emphasis added).

The only opinion cited by Petitioners which recognizes a court's right to waive the requirements of Rule 56(f) is the district court opinion in *Smith v. Community Federal Savings & Loan*, 77 F.R.D. 668 (N. D. Miss. 1977), where the court noted that there are "occasions when" literal compliance with Rule 56(f) may be overlooked, citing *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973), *cert. denied*, 414 U.S. 1116 (1974). Assuming the *Smith* and *Littlejohn* courts are correct in their view that Rule 56(f) may be waived, which is questionable, the

mere recognization of a court's discretionary powers to overlook procedural formalities is a far cry from Petitioners' request that a court be *required* to deny or delay summary judgment any time vague, unsworn allegations are made that further discovery "may" turn up facts sufficient to rebut the motion. As discussed above, this theory has been expressly rejected by this Court. *First National Bank v. Cities Service Company*, 391 U.S. 253, 290 (1968).

In an attempt to make their cause more appealing, Petitioners imply that the trial court and Court of Appeals holdings required them to file a Rule 56(f) affidavit simply to notify the trial court of the obvious fact that certain discovery had been stayed. According to Petitioners, the Fifth Circuit denied their appeal citing their failure to file an affidavit *"stating that their discovery had been cut off . . . ."* Petition, p. 11. (emphasis added). Petitioners say they are "incredulous that Petitioners would be required to make an affidavit to the District Court that it, and its magistrate, *had cut off the discovery*, especially since those relevant orders of the magistrate had been appealed to the District Court who affirmed the stay of Petitioners' discovery." *Id.* (emphasis added).

Petitioners' argument mischaracterizes the actual holding of the Fifth Circuit. The opinion in fact held that Petitioner erred in failing to submit an affidavit that "he was *foreclosed by* [the] discovery order from presenting 'facts essential to justify his opposition.' . . . the non-movant 'may not simply rely on vague assertions that additional discovery will produce needed but unspecified facts' [citations omitted] ". *Taylor v. Federal Home Loan Bank Board*, no. 85-1067 (5th Cir. July 1, 1985), *reprinted in* Petition, Appendix I-1, 5 (emphasis added). Contrary to Petitioners' representations, the Fifth Circuit did not base its decision on their failure to inform the District Court formally of the mere existence of the discovery orders but on their failure to explain specifically *if* and *how* such discovery

orders foreclosed them from developing facts necessary to oppose the motion for summary judgment.

Petitioners also cite cases from various circuits which observe that continuances should routinely be granted under Rule 56(f) where the moving party has "sole possession of the relevant facts." Petition, p. 13, citing *Hebert v. Wicklund*, 744 F.2d 218 (1st Cir. 1984). Such cases on their face are inapplicable to Petitioners' claim herein because Petitioners do not allege that the moving party, Pezzulli, had "sole possession of the relevant facts." Indeed, Petitioners' claims involved allegations that Pezzulli conspired with 74 other named and unnamed defendants to deprive Petitioners of their civil rights. Petitioners have argued all the way through this case that even if Pezzulli did not personally commit any of the alleged acts, as shown by his summary judgment affidavits, he would still be liable as a co-conspirator. In addition, Petitioners alleged that the conspirators made certain false and defamatory statements to Petitioners' landlord, business associates, and the Zoning Department of the City of Dallas, Texas in order to injure Petitioners. This case is therefore the opposite of one where the movant has "sole possession of the relevant facts" because, by definition, the relevant facts would also be in the possession of 74 other named and unnamed defendants, as well as such third party witnesses as Petitioners' business associates, landlord, and the Dallas zoning officials. (A zoning department official was deposed. He denied any knowledge of a false complaint made by any defendant, and said the anonymous complaint that was made to the department was valid.) In addition, the opinions cited by Petitioners state only general principles of law and do not purport to establish a strict rule that continuances must always be granted in such situations, much less when the non-movant fails to allege specifically what relevant facts are in the sole possession of the movant.

Petitioners allege broadly that the above-cited case law reveals that the Circuit Courts are in disagreement "as to this area of the discovery and summary judgment law, and that the Fifth Circuit at times appears not to agree with its own prior rulings." Petition, p. 14. A review of the cases cited, however, reveals no such disagreement among the circuits and reveals that Petitioners are the only ones to whom the Fifth Circuit appears to be inconsistent.

Petitioners purport to raise a due process claim in their Petition. This claim was never raised in the District Court or the Court of Appeals, however, and is therefore not a proper subject for review on certiorari. *See Berkemer v. McCarty*, 104 S. Ct. 3138 (1984) (Supreme Court may, but is reluctant to, consider issue not raised in courts below). In any event, the due process claim is virtually ignored in the body of the Petition, and Petitioners do not cite a single case supporting or explaining their due process claim. The only reference to due process in the Argument and Authorities section of the Petition is a single conclusory sentence on page 14, which is unsupported, unpersuasive, and amounts to virtually no argument at all.

Petitioners also purport to put the merits of the summary judgment in issue by including it in their "Questions Presented." Once again, however, Petitioners fail to address this issue at all in the body of their Petition (except as discussed below). They fail to even identify the fact issues which they allege exist in the summary judgment record, and fail to attach crucial portions of the summary judgment record such as their own Complaint or the second Pezzulli Affidavit in support of his motion for summary judgment, preventing even a cursory review of the complete summary judgment record. By failing to address this issue, Petitioners have abandoned any claim that the summary judgment was unsupported by the record. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. 1982), *cert denied*, 464 U.S. 818 (1983) (failure to brief and

argue an issue is grounds for finding it has been abandoned). *See also Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984) (court will not consider claim presented in perfunctory and undeveloped manner in brief). This Brief will not attempt to reargue the merits of the summary judgment. Respondent merely notes that both the District Court and Court of Appeals fully considered the matter and felt summary judgment was warranted.

Petitioners attempt to bolster the summary judgment record by attaching various documents to their Petition as Appendix XI, even though such documents were not on file at the time judgment was rendered. Petitioners go so far as to proclaim that "*Appendix XI constitutes Petitioners' proof.* Had these letters and pleadings been available to Petitioners at the time of summary judgment, Petitioners could have used them as evidence of the conspiracy." Petition, p. 15 (emphasis added).

The purported "proof" attached as Appendix XI is improper and of no avail for several reasons. First, as a matter of law, a non-movant cannot attack a summary judgment on appeal by introducing new evidence to buttress the existing summary judgment record. *John v. Louisiana (Board of Trustees)*, 757 F.2d 698, 710-11 (5th Cir. 1985). Second, the alleged "proof" contained in Appendix XI is meaningless. Appendix XI consists of seven documents dated between October and December, 1985, over nine months after the summary judgments at issue had been granted in January, 1985. Petitioners are apparently claiming that documents that were not even in existence when summary judgment was granted somehow justify a reversal on the merits after the fact. This claim is too ludicrous to be addressed further.

The documents themselves do absolutely nothing to support a claim of conspiracy to violate Petitioners' civil rights. The first document is a motion to strike an exhibit attached to an affidavit of Petitioners' attorney, which was filed in the case

below subsequent to the time Pezzulli was dismissed on summary judgment. It has nothing to do with a conspiracy. It was signed by Respondent Pezzulli as attorney of record for Hi-Plains Savings & Loan Association, which is still a party in the case below, and indicates on its face that it was served on Dorothy Palumbo, attorney of record for Petitioners, as required by the Federal Rules. The second document is a letter from one of the attorneys in pending state court litigation regarding a request for findings of fact and conclusions of law. Again, this letter has nothing to do with a secret conspiracy to violate Petitioners' civil rights. Nor was the document itself secret, because it indicates on its face that it was copied to Reva Knight, another attorney for Petitioners. The third document in Appendix XI is a letter to the court in the case below regarding typographical errors in a previously filed Motion to Dismiss. Again, nothing is stated therein relating in any way to a secret conspiracy to violate Petitioners' civil rights, and a copy of such document was apparently served on attorneys for Petitioners. Document four of Appendix XI is a letter to Petitioners' counsel acknowledging receipt of their motion to strike in the pending state court litigation. What this letter has to do with a conspiracy is frankly a mystery to Respondents. Document five is a transmittal letter filing a Motion for Sanctions by one of the remaining defendants in the case below. Document six is a transmittal letter transmitting discovery documents to Petitioners' attorneys in the state court litigation. Document seven is a letter to Petitioners' attorneys warning them not to attempt to violate a court order in the pending state litigation. Every single one of these documents is either a pleading, a transmittal letter, or routine correspondence relating to pending civil lawsuits. Every single one of these documents indicates on its face that it was either mailed to or copied to Petitioners' own counsel. Petitioners fail to explain why these documents were attached to their Petition, how these late 1985 documents relate in any way

to an alleged 1983-84 conspiracy, and why Petitioners feel that Pezzulli's actions in serving copies of pleadings and correspondence on other attorneys of record as required by the Federal Rules constitutes evidence of a conspiracy. Appendix XI is a farce, and, since it admittedly "constitutes Petitioners' proof," Appendix XI argues strongly that the Petition itself is also a farce.

CONCLUSION

Respondent respectfully prays that Petitioners' Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Brief in Opposition has been delivered and served on the following: William E. Palmer, Esq., Reva Knight, 2902 Carlisle, Suite 105, Dallas, Texas 75204, Attorneys for Petitioners.